

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2006 Session

WILLIAM B. ROBINSON v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2001-A-383 Steve Dozier, Judge

No. M2005-01122-CCA-R3-PC - Filed November 22, 2006

The petitioner, William B. Robinson, appeals the post-conviction court's denial of post-conviction relief. On appeal, he argues that (1) the trial court's giving an instruction on first-degree murder was plain error, and (2) the post-conviction court erred in denying post-conviction relief because he received the ineffective assistance of counsel. Upon our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and NORMA MCGEE OGLE, JJ., joined.

J. Michael Brown and Aminah M. Collick (on appeal), and Michael A. Colavecchio (on appeal and at trial), Nashville, Tennessee, for the appellant, William B. Robinson.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Katrin Novak Miller and Angelita B. Dalton, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A Davidson County jury convicted the petitioner of premeditated first-degree murder and he was sentenced to life imprisonment. The petitioner's conviction arose out of a domestic dispute between the petitioner and his fiancée, Sheila Calloway, that ended with the petitioner fatally stabbing Ms. Calloway. As a result, the petitioner was convicted of first-degree murder and received a life sentence. This court affirmed the petitioner's conviction on direct appeal. *See State v. William Brian Robinson*, No. M2002-00665-CCA-R3-CD, 2003 WL 21653882 (Tenn. Crim. App., at Nashville, July 11, 2003), *perm. app. denied* (Tenn. Nov. 24, 2003). The petitioner then filed a timely pro se petition for post-conviction relief and following the appointment of counsel an

amended petition was filed. The post-conviction court conducted an evidentiary hearing on March 29, 2005.

At the hearing, Officer Mike Sanders with the Metro Nashville Police Department testified that on November 9, 2000, he was dispatched to the scene of the stabbing at approximately 11:29 a.m. and was the second officer on the scene after Officer Whitley. Upon his arrival, Officer Sanders encountered the petitioner standing beside the outside door of his apartment seemingly within Officer Whitley's sight. Officer Sanders noticed that the petitioner was visibly upset and very talkative but he could not recall whether the petitioner was crying. He said that the petitioner talked about the crime, and a paramedic indicated that the victim had been stabbed approximately one hour earlier. Officer Sanders stated that he put the petitioner in the back of his patrol car, and the petitioner soon after began talking. Officer Sanders explained, however, that the tape recording he made of the petitioner's comments in the patrol car was inaudible.

Detective Mike Smith with the Metro Nashville Police Department testified that he was lead investigator in the petitioner's case. Detective Smith arrived at the scene approximately an hour after the patrol officers and the petitioner was in the back seat of Officer Sanders' patrol car. Detective Smith stated that the petitioner was upset and whining. Detective Smith admitted, however, that at the preliminary hearing he had said that the petitioner was "crying" and had said at trial that the petitioner was "whining and trembling."

Detective Smith testified that the petitioner immediately wanted to talk about the murder, but Detective Smith did not question him at that point. Detective Smith explained that his standard protocol was to question suspects in his office at the Criminal Justice Center. Detective Smith stated that he and Investigator Brad Corcoran interviewed the petitioner in his office around 1:30 p.m. When asked why he had previously testified that the patrol officers arrived at the scene at approximately 11:00 a.m. when the call did not come in until 11:25 a.m., Detective Smith stated that he was probably off by thirty minutes in estimating the time the officers arrived.

The petitioner testified that fifteen to twenty minutes elapsed between the incident and the time the police were called, during which time he hugged the victim's body and got blood on the front of his clothes. The petitioner recalled that the incident happened behind the ironing board so he tried to walk the victim to the bedroom but she collapsed. The petitioner said that he applied pressure to the victim's chest wound and placed a pillow under her head. He also said that he wrapped her in a blanket and used an oxygen machine on her when she stopped breathing.

The petitioner testified that after he tried to revive the victim for fifteen to twenty minutes, he panicked and called his mother. The petitioner stated that he thought he called 911 around 11:23 a.m. and was sitting in the stairwell crying when Officer Whitley arrived. He stated that he was still crying when Officer Sanders arrived and continued crying until he arrived at the homicide office. The petitioner testified that he emphasized to counsel that it was very important to point out that he was upset and crying for two hours after the murder. The petitioner said that he discussed the importance of his demeanor after the stabbing with counsel during the preliminary hearing and at

trial, but counsel did not appear to find the issue that important. The petitioner stated that counsel did not question Detective Smith further when Smith testified that the petitioner was “whining and trembling” instead of “crying.” The petitioner also stated that counsel did not emphasize to the jury that he had been crying for two hours and was not just upset and whining. The petitioner recalled that counsel did not address the inconsistencies in the times the officers said they arrived at the scene.

The petitioner testified that counsel did not request the audiotape made during the time he spent in the patrol car after the murder and he did not know whether counsel ever heard the tape. He said that the tape was supposedly inaudible. The petitioner also said that he did not meet with counsel very often, at most a total of six hours. The petitioner acknowledged that he met with counsel the day before his trial but said that it was not a long visit. The petitioner stated that counsel never communicated with him over the telephone or by letter. The petitioner also stated that counsel did not file a motion to suppress the results of a blood test that came back inconclusive. The petitioner further stated that counsel’s argument on the motion for judgment of acquittal was rather short and did not include case law.

On cross-examination, the petitioner testified that his family retained counsel at the preliminary hearing stage, and the trial court then appointed counsel to represent him at trial when his family could no longer pay. The petitioner said that he had faith in counsel before and during trial even though there were some matters he wished counsel would have pursued. When asked what counsel could have done to get him acquitted, the petitioner stated that counsel could have pointed out that he did not call 911 because he was “distraught,” and could have informed the jury that according to statute, his failure to call 911 did not show premeditation. He also stated that counsel should have met with him more often. The petitioner admitted that counsel discussed his taped statement to police, and sent him a transcript of the tape although he did not receive the transcript until just before trial.

The petitioner testified that he received cuts on his arms from the victim. He said that the victim cut him with the same knife that he eventually got from her and used to stab her. The petitioner stated that he did not seek medical attention for his cuts. When asked about counsel’s failure to have inconclusive blood tests suppressed, the petitioner said that counsel should have seen the DNA report prior to trial and worked on getting it suppressed. The petitioner claimed that the police officers put his blood on the steak knife that was found on the dining room table.¹ The petitioner stated he thought Detective Smith was lying at trial and counsel should have pointed out the inconsistencies between the detective’s preliminary hearing testimony and trial testimony.

The petitioner’s trial counsel testified that he has been licensed to practice law since 1991 and his primary practice is family and criminal law. Counsel stated that he also had a degree in Chemistry and Molecular Biology which he found useful in the petitioner’s case due to the expert

¹ The record indicates that the victim was killed with a butcher knife, but apparently there was also a steak knife found at the scene.

testimony in the field of DNA serology at trial. Counsel recalled that he received the DNA serology report prior to trial and did not see a legal basis to suppress the results of the test. Counsel said that he discussed the report with the petitioner and how it would affect his defense. The petitioner never asked him to file a motion to suppress the results of the test.

Counsel testified that he met with the petitioner at least six times in jail, and the petitioner also wrote him letters. Counsel stated that he was satisfied with the amount of time he spent with the petitioner. Counsel said that he consulted the medical examiner, Dr. Charles Harlan, concerning the petitioner's wounds and determined Dr. Harlan's testimony would not be beneficial to the petitioner's case. Counsel recalled that the petitioner approved of his decision to not call Dr. Harlan. Counsel testified that the only time the petitioner was not happy with counsel's representation was when the jury found him guilty of first-degree murder.

Counsel testified that he visited the crime scene and took pictures before it had been cleaned up. Counsel stated that he retrieved the victim's journal from the scene at the petitioner's request. Counsel also stated that the petitioner had a law enforcement background and was very involved in his case. The petitioner insisted on testifying at trial and he testified fully. Counsel said that he effectively cross-examined Detective Smith and Officer Sanders about whether the petitioner was crying, and Officer Sanders testified that the petitioner was distraught which was what the petitioner stated. Counsel also said that he relayed the state's plea offer of second-degree murder to the petitioner, but the petitioner did not want to take that offer.

On cross-examination, counsel testified that he discovered that there was an audiotape of the petitioner talking after being placed in Officer Sanders' patrol car. However, counsel did not recall if he ever heard the tape. Counsel related that Officer Sanders informed him that the tape was inaudible. Counsel stated that the petitioner thought his demeanor after the murder was important to his defense although counsel felt that it was only somewhat important. Therefore, counsel stated that he elicited testimony regarding the petitioner's mental state from the officers involved and the sum of that testimony was that the petitioner was distraught, upset, and crying. Counsel felt that the jury was aware that the petitioner was upset regardless of whether the word "crying" was actually used.

Counsel testified that only one locus of the blood test was inconclusive, and he cross-examined the serologist about the DNA report. Counsel said that he did not recall his motion for judgment of acquittal being "fairly short" as testified to by the petitioner. Counsel felt that in closing argument he strongly emphasized that the murder was not premeditated. Counsel said that he thought the jury considered the fact that the petitioner stabbed the victim and let her bleed to death in his arms instead of getting help as evidence of premeditation. Counsel testified that he tried to defend against that perception through his cross-examination of the medical examiner by eliciting testimony that the victim would have died anyway.

Following the hearing, the post-conviction court entered an order denying the petitioner's request for post-conviction relief.

II. STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

III. ANALYSIS

A. First-Degree Murder Instruction

The petitioner first argues that it was plain error for the trial court to give an instruction on premeditated first-degree murder because the state admitted, when arguing against his motion for judgment of acquittal, that it could not prove that premeditation existed before or during the stabbing. He notes that “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R. Crim. P. 52(b). The state asserts that the petitioner is essentially challenging the sufficiency of the evidence of premeditation, an issue that was previously adjudicated on direct appeal. *See William Brian Robinson*, 2003 WL 21653882, at *12. We conclude that the petitioner is not entitled to relief for the following reason.

The petitioner has waived this issue for failing to raise it on direct appeal as required by the Post Conviction Procedure Act. A ground for relief is waived “if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” Tenn. Code Ann. § 40-30-106(g). The petitioner urges this court to overlook waiver and undertake plain error review, however, this court has previously explained that “the plain error doctrine has no application in post-conviction relief proceedings.” *See Marcus E. Thompson v. State*, No. E2004-03028-CCA-R3-PC, 2006 WL 36907, at *12 (Tenn. Crim. App., at Knoxville, Jan. 4, 2006); *Corwyn E. Winfield v. State*, No. W2003-00889-CCA-R3-PC, 2003 WL 22922272, at *5 (Tenn. Crim. App., at Jackson, Dec. 10, 2003), *perm. app. denied* (Tenn. May 10, 2004); *see also State v. West*, 19 S.W.3d 753, 756-57 (Tenn. 2000).

B. Ineffective Assistance of Counsel

The petitioner also argues that he received the ineffective assistance of counsel. On appeal, he specifically asserts that counsel failed to adequately set up his defense that the stabbing was a response to the victim's attack and failed to challenge the trial court's giving a jury instruction on premeditation.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner bears the burden of proving (1) that counsel's performance was deficient, and (2) the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings were fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Id.* at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Also, a fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad*, 938 S.W.2d at 369. However, deference is given to strategy and tactical decisions only if the decisions are informed ones based upon adequate preparation. *Id.* (citations omitted).

The petitioner's first allegation of ineffective assistance is that counsel did not adequately set up his defense that the stabbing was a response to the victim's attack. He asserts that counsel should have set up this defense by cross-examining the police officers regarding his "distraught" state after the murder. In this regard, the post-conviction court found:

[T]he petitioner asserts that trial counsel failed to emphasize inconsistencies between preliminary hearing testimony and trial testimony that would tend to discredit the credibility of certain witnesses. Specifically the petitioner claims that Detective Michael Smith testified at the preliminary hearing that the petitioner was "crying" immediately following the incident but testified at the trial that the petitioner was "whining" and his voice was "trembling". [sic] The petitioner claims this distinction is important to negate the element of premeditation of first degree murder from it's [sic] lesser included offenses. The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the trier[] of fact. *See State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Although Detective Smith did not specifically say at trial that the petitioner was "crying", [sic] he did testify that he was upset. The petitioner himself, as well as his mother, testified that he was crying when

the police arrived. Therefore the petitioner was able to explain to the jury his mental state immediately following the death of the victim. The Court sees no error in trial counsel's presentation of proof on this issue and certainly sees no prejudicial effect on the trial process. The jury also heard about other[] circumstances they could consider such as the first wound was inflicted in the back and then the petitioner pulled the knife out of the victim, turned the victim around and stabbed her in the front with considerable force. The petitioner also testified that the victim did not pose a serious risk to the petitioner, that the victim did not do anything to justify the stabbing, and that he did not call 911 for assistance after the incident but chose to call his mother and a former girlfriend. Although there is a difference in terminology used during Detective Smith's testimony at the preliminary hearing and at trial, there was sufficient other evidence presented to the jury as to the petitioner's mental state and the jury still found that premeditation did exist. The Court is of the opinion that even if counsel explored the matter further, it would not have had an effect on the outcome of the trial.

Upon review, we cannot conclude that trial counsel's performance was deficient, or that any deficiency caused the petitioner prejudice. At the evidentiary hearing, counsel testified that he felt he effectively cross-examined Detective Smith and Officer Sanders concerning their testimony. Counsel stated that Officer Sanders testified that the petitioner was distraught after the murder which was what the petitioner stated. Counsel explained that the substance of everyone's testimony was that the petitioner was upset, regardless of whether the word "crying" was used. The petitioner's demeanor following the stabbing was aptly brought to the jury's attention. As such, the evidence does not preponderate against the post-conviction court's findings.

Regarding the petitioner's allegation that counsel was ineffective for failing to object to the trial court giving a jury instruction on premeditation, we discern no prejudice. Assuming *arguendo* that counsel's failure to object was deficient, the trial court would have given the instruction anyway. There is a duty upon the trial judge in a criminal case to give the jury a complete charge on the law applicable to the facts of the case. *See Poe v. State*, 370 S.W.2d 488, 489 (Tenn. 1963). As already noted, there was sufficient evidence of premeditation in this case. Thus, the trial court would have still given the instruction on premeditation; therefore, the petitioner has failed to show how counsel's failure to object to the jury instruction on premeditation caused him prejudice.

IV. CONCLUSION

Following our thorough review, we affirm the post-conviction court's denial of post-conviction relief.

J.C. McLIN, JUDGE